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No. 1022

In the Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA, APPELLANT

v.

DONALD JOSEPH COTTON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

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OPINION BELOW

The order of the district court dismissing the indictment (Appendix, p. 13, *infra*) is not reported.

JURISDICTION

The order of the district court dismissing the indictment was entered on June 11, 1969. A notice of appeal was filed on July 7, 1969. The jurisdiction of this Court rests on 18 U.S.C. 3731, which authorizes a direct appeal from a decision sustaining a motion in bar, where the defendants have not been put in jeopardy (but see *infra*, pp. 2–3).

QUESTION PRESENTED

Whether, in this well publicized case, the district court could properly dismiss the prosecution against appellees upon a determination that an impartial jury could not be empaneled.

STATEMENT

This appeal arises from the dismissal by Judge Gordon of the United States District Court for the Eastern District of Wisconsin of a three-count indictment charging the ten appellees and five others with conspiracy to mutilate and destroy records of the Selective Service System and to interfere with the administration of the Selective Service Act (count 1) and the completed substantive acts (counts 2 and 3), in violation of 18 U.S.C. 371 and 2071, and 50 U.S.C. App. 462(a). The circumstances leading to the dismissal are set forth in detail in the government's petition for a writ of certiorari in *United States* v. *Judge Myron L. Gordon*, which we have filed contemporaneously with this appeal, and which we incorporate by reference.

At the outset we deem it appropriate to point out the reasons why our jurisdictional statement was not timely filed. Although the government filed with the district court timely notices of appeal both to this Court and to the court of appeals, we concluded, upon a thorough analysis of the circumstances underlying the dismissal of the indictment against the defendants, that the remedy of mandamus was appropriate and that in any event an appeal did not lie because Judge Gordon's decision was not in substance sustain-

ing a plea in bar. See 18 U.S.C. 3731 and the discussion in our petition for a writ of certiorari in *Gordon, supra*. Accordingly, we pursued the course of mandamus in the court of appeals; the record was necessarily docketed in the Seventh Circuit until this time. The decision of the Seventh Circuit was reached on November 26, 1969, almost three weeks beyond the time allowed for docketing an appeal in this Court, plus any extensions authorized by Rule 13 of the Rules of this Court. That court concluded, contrary to our assessment, that not only did an appeal lie with this Court under Section 3731, but that it was the only course of review open to the government. Although we disagree with the Seventh Circuit's conclusion, and are challenging it in our certiorari petition, in view of that court's decision, coupled with the fact that the considerations which deterred us from perfecting our appeal until now are no longer present,[1] we are pursuing this course of action as a protective measure.

THE QUESTION IS SUBSTANTIAL

Assuming that the decision is appealable, the issue involved here is a matter of increasing importance: the problems which a court faces when dealing with defendants who have been exposed extensively to pretrial publicity, particularly when the government is

[1] Besides our inability to docket the case before now, we also considered the fact that we would have been placed in the awkward position of having two separate actions in two different courts involving essentially the same matters. That dilemma was, of course, overcome when the court of appeals reached its decision.

blameless and the conduct of the defendants might have contributed largely to the publicity. Having concluded that the community hostility resulting from the adverse publicity was of such magnitude as to prevent the selection of an impartial jury in mid-June, 1969, the court correctly determined that there were three possible approaches: continuance, change of venue, or additional voir dire. Judge Gordon erred, however, in determining that all three avenues were unavailable because they infringed upon constitutional rights asserted by appellees. As we discuss below, within each option there existed some action which could have been considered and taken, without violating the rights of the appellees and without resorting to the extreme and unprecedented course of dismissing the prosecution. Had any of these actions been taken, the illogical decision to dismiss the indictment would not have been reached.

a. *Venue.* When appellees refused Judge Gordon's invitation to request a change of venue, he dismissed all thought of transferring the cause. Prior to July 1, 1966, the question of removal would indeed have been settled in this fashion. Up to that time, Rule 21(a), F.R. Crim. P., allowed the court to transfer a case to another district or division within the same district only upon motion of the defendant. The amended Rule 21(a), however, omits all references to divisions:

> The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the

> prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

The Notes of the Advisory Committee on Rules plainly set forth the purpose of the 1966 change (18 U.S.C.A., Rule 21, p. 136 (1969 ed.)):

> All references to divisions are eliminated in accordance with the amendment to Rule 18 eliminating division venue. The defendant is given the right to a transfer only when he can show that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in the district. Transfers within the district to avoid prejudice will be within the power of the judge to fix the place of trial as provided in the amendments to Rule 18. * * * [2]

Accordingly, the court could have contemplated the feasibility of holding court in Green Bay or Oshkosh, both within the Eastern District of Wisconsin (28 U.S.C. 130), but far enough away from Milwaukee to provide reasonable assurance that an impartial jury could be empaneled. It is true that Judge Gordon commented at the time he dismissed the indictment that the hostile publicity surrounding the appellees precluded a fair trial "in this district" (Dismissal Tr. 10). However, there is nothing in the record to show

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[2] Rule 18 provides:

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

that he actually investigated the likelihood of trial elsewhere in the district; rather, it appears that his conclusion resulted only from his appraisal of the situation in Milwaukee and his belief that the city's newspapers, which he held responsible for the inflammatory publicity, had wide coverage throughout the state of Wisconsin.[3] Manifestly, the court should have conducted a more extensive inquiry before taking the exceptional step of dismissing the indictment.[4]

b. *Continuance.* Judge Gordon's rejection of this option is based upon an erroneous view of the right to a speedy trial. The facts that ten months had passed since the offense was committed, that appellees had demanded a speedy trial, and that the government had consented to trial at that time, controlled his decision to reject the possibility of continuance. At the same time the court conceded that the government was blameless for any delay up to the time of trial, and acknowledged that appellees could be faulted for ere-

[3] Judge Gordon expressed this opinion in April 1969 when he denied severed co-defendant Hagedorn's motion for a change of venue to the Western District of Wisconsin, and instead ordered his case transferred to the Northern District of Illinois.

[4] Support for our position that trial elsewhere in the district would have been possible is found in the transcript of the voir dire of several prospective jurors who claimed to have been unaffected by the pretrial publicity. One, a resident of Racine, recognized the name "Milwaukee 14", but told the court that he had given the matter little consideration. He stated further that "I don't think it's been quite as publicized in Racine possibly as it has been in Milwaukee" (Tr. 207). Similar statements were made by a juror from Whitewater (Tr. 339) and one who had spent most of his time in one of the northernmost counties within the Eastern District of Wisconsin (Tr. 320).

ating the adverse conditions by generating hostile publicity. It is settled law that the right to a speedy trial is relative, its purpose being to secure a defendant's rights while serving the interests of public justice as well. *Beavers* v. *Haubert,* 198 U.S. 77, 87. The essential ingredient is orderly expedition, not mere speed. *Smith* v. *United States,* 360 U.S. 1, 10; *United States* v. *Ewell,* 383 U.S. 116, 120. Time is indeed a factor to consider in determining whether a defendant has been denied a speedy trial, but is is not the only factor:

> Briefly, the question whether there has been denial of the right to a speedy trial depends on the circumstances of the case, and requires consideration of the length of delay; reasons for the delay; diligence of the prosecutor, court and defense counsel; and reasonable possibility of prejudice from the delay. [*Hedgepeth* v. *United States,* 365 F. 2d 952, 954 (C.A.D.C.).]

On balance, a continuance would have been appropriate notwithstanding appellees' insistence that they be tried immediately. With no delay chargeable to the prosecution up to that time, no issue of diligence on the part of any court officer, and only ten months elapsing since the offense was committed (nine months since indictment; see *Nickens* v. *United States,* 323 F. 2d 808, 809 (C.A.D.C.), certiorari denied, 379 U.S. 905), the granting of a continuance in June 1969, on the possibility that the threat of a biased jury would abate, would not have denied any Sixth Amendment rights of appellees—who must share the responsibility for the inability to conduct a trial. See *Sheppard* v.

Maxwell, 384 U.S. 333, 363; *Harrison* v. *United States*, 392 U.S. 219, 221 (n. 4). Moreover, Judge Gordon did not need a motion by the government before he could order a continuance; he could have declared a delay on his own motion by reason of "court necessity." *King* v. *United States*, 265 F. 2d 567, 570 (C.A.D.C.), certiorari denied, 359 U.S. 998; see *Gori* v. *United States*, 367 U.S. 364, 368.

In refusing to consider a continuance, Judge Gordon expressed the opinion that there was no reason to believe that an early successor date would cure the conditions then present. He also gave significant weight to the prejudice resulting from the inability of a sentence upon conviction at a subsequent time to be made to run concurrently with sentences now being served following state convictions for offenses arising from the same incident. We submit, however, that at that juncture a decision to the effect that a reasonable short delay would not have had a salutary effect on the problem of community hostility was premature, and, at the least, should not have been completely discounted when the alternative was dismissal of the indictment. Moreover, appellees have no right to a concurrent sentence. They were punished by the state for crimes strictly within the state's interest: burglary, arson and theft. The federal government seeks to prosecute for offenses not cognizable by the state but essential to protect federal interests. In the circumstances, the loss of the possibility of a sentence upon conviction in the federal courts operating concurrently with one imposed by another jurisdiction for different

offenses should not have deterred the court from ordering a continuance.[5]

c. Voir Dire. Generally, the questions posed by the court in its voir dire of 141 prospective jurors followed a similar pattern. Initially, Judge Gordon sought to learn whether the juror had heard of the "Milwaukee 14," and if so, how recent and extensive that information was. Other questions inquired whether the juror was familiar with the recent state trial, whether he had engaged in conversations where either he or others had commented upon the acts charged, whether he had a personal opinion regarding the conduct charged or draft resisters in general, whether he or close relatives had any military experience, whether he believed that appellees should be convicted to set an example for others who might consider performing similar conduct, and whether he would be influenced by the fact that one or more of the appellees was a clergyman.

Few of the prospective jurors were subjected to the entire inquiry, for, when the judge detected a preconceived opinion unfavorable to the defendants, he immediately cut short his inquiry and thereafter excused the juror with no further questioning. (See,

[5] We recognize of course, that a federal court has discretionary power to impose a sentence concurrent with one given by a state court, and that the possibility of a concurrent sentence is a consideration in determining whether one has suffered "undue and oppressive incarceration prior to trial" and thereby has been denied his Sixth Amendment right. *Smith* v. *Hooey*, 393 U.S. 374, 378. However, in the totality of circumstances presented here, that consideration manifestly did not outweigh the factors favoring continuance.

e.g., Tr. 82, 103, 110–111, 170, 204, 216, 272, 394, 476). The inevitable result of applying this standard of eligibility was the first hand rejection of all but 28 of the 141 so interviewed.

Judge Gordon's cautious attitude was of course proper in the circumstances, since he was confronted with a case that had received much notoriety, and which dealt with a particular issue generating strong feelings throughout the nation. We believe, however, that despite the need for careful inquiry to root out the bias of prospective jurors, the court's criteria were excessive, and failed to focus upon the crucial point whether the juror would be able to set aside whatever preconceived notions he carried into the courtroom and try the case solely on the evidence adduced there. This has long been the constitutional test for determining juror eligibility. *Reynolds* v. *United States,* 98 U.S. 145; *Irvin* v. *Dowd,* 366 U.S. 717, 721–724; see also *Holt* v. *United States,* 218 U.S. 245, 248. After all, defendants of far greater general notoriety than the Milwaukee 14 have been tried successfully by juries composed of individuals who undoubtedly had some familiarity with the identity or conduct of those defendants. This Court's discussion in *Irvin, supra,* 366 U.S. at 722–723, is pertinent:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any

> of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard: It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. * * *

Certainly, a court has wide discretion in the matter of voir dire, and a finding on the force of a prospective juror's preconceived opinion will not be set aside unless manifest error is found. *Irvin* v. *Dowd*, 366 U.S. at 723. But a necessary precondition to the operation of that rule is adequate inquiry to determine the intensity of the juror's impressions. Continued inquiry of the overwhelming number of jurors whom the court summarily disqualified might or might not have disclosed an impediment to service on the panel by some or even conceivably all of them. Our position, however, is that disqualification on the ground of bias without adequate inquiry as to whether a juror's impressions could be set aside and an opinion rendered on the evidence is just as erroneous as a determination under the same circumstances that the juror was fit to serve. The transcript of the voir dire contains numerous instances of abrupt termination of questioning without sufficient reason to believe that a juror's mind was not "open to an

appreciation and appraisal of the testimony only as it came from the stand, and to base decision exclusively on the evidence adduced at trial." *Rees* v. *Peyton*, 341 F. 2d 859, 864 (C.A. 4), certiorari pending, 384 U.S. 312, 386 U.S. 989.

CONCLUSION

For the reasons stated, if the Court should conclude that an appeal lies here, the decision of the district court should be reversed with instructions to determine properly whether a general community prejudice still prevails, and if so, to take whatever measures are deemed most appropriate upon consideration of the options available as discussed above.

Respectfully submitted.

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DECEMBER 1969.

Our view that Judge Gordon's standard of bias was excessive and his inquiry inadequate on occasion is based upon a reading of the record overall. As example, we refer to the testimony of prospective jurors: Jacobs (Tr. 64–67); Klink (Tr. 237–238); Schultz (Tr. 259–261); Trogun (Tr. 296–299) and Banker (Tr. 451–457).

APPENDIX

United States District Court, Eastern District of Wisconsin

No. 68–CR–113

UNITED STATES OF AMERICA, PLAINTIFF

v.

DONALD JOSEPH COTTON, JAMES HENDRICKSEN FOREST, ROBERT EDWARD GRAF, JAMES WILLIAM HARNEY, ALFRED LAWRENCE JANICKE, BASIL KENELM O'LEARY, DOUGLAS IAN MARVY, ANTHONY JOSEPH MULLANEY, FREDERICK JOHN OJILE, LAWRENCE EDWARD ROSEBAUGH, DEFENDANTS

Order of Dismissal

Whereas this case came on for trial by jury on June 9, 1969, and

Whereas the court after conducting a voir dire examination of 142 jurors has concluded that because of broad community prejudice an impartial jury cannot be impaneled in this state and this district and

Whereas the court has determined that the period of time which would be required to pass before an impartial jury might be impaneled would prejudice the rights of these defendants, and

Whereas the defendants have demanded a speedy trial, and

Whereas approximately 10 months have elapsed since the alleged crime,

Now, therefore, *It is ordered*, on the court's own motion, that judgment be and hereby is entered dismissing the indictment.

Dated at Milwaukee, Wisconsin, this 11th day of June, 1969.

/s/ Myron L. Gordon,
U.S. District Judge.